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No. 338

In the Supreme Court of the United States

OCTOBER TERM, 1948

DEFENSE SUPPLIES CORPORATION AND RECONSTRUCTION FINANCE CORPORATION, PETITIONERS

v.

LAWRENCE WAREHOUSE COMPANY, CHESTER DAIRY PRODUCTS COMPANY, T. J. McGRAW, AND CLYDE W. HEATER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS

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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 298

DEFENSE SUPPLIES CORPORATION AND RECONSTRUCTION FINANCE CORPORATION, PETITIONERS

v.

LAWRENCE WAREHOUSE COMPANY, CAPITOL CHEVROLET COMPANY, V. J. MCGREW, AND CLYDE W. HENRY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The majority and dissenting opinions of the United States Court of Appeals for the Ninth Circuit (R. 396–425) are reported at 168 F. 2d 199. Earlier opinions of the Court of Appeals (R. 370–380) and of the United States District Court for the Northern District of California (R. 63–75) not concerned with the issues now before the Court are reported at 164 F. 2d 773 and 67 F. Supp. 16, respectively.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on April 6, 1948 (R. 426–427). A petition for rehearing, seasonably filed, was denied on May 13, 1948 (R. 428). On August 12, 1948, the time to petition for certiorari was extended to October 1, 1948, by the Chief Justice (R. 430). The petition for a writ of certiorari was filed on September 24, 1948, and granted on November 8, 1948. The jurisdiction of this Court rests upon 28 U. S. C. 1254.

QUESTION PRESENTED

The Joint Resolution of June 30, 1945 (c. 215, 59 Stat. 310) provided for the dissolution on July 1, 1945, along with other named government corporations, of Defense Supplies Corporation, and for the transfer to Reconstruction Finance Corporation of all its functions, powers, duties, and authority, together with all its assets and liabilities, to be administered "as if originally vested in Reconstruction Finance Corporation." It also provided that no suit previously instituted by or against such corporations should abate by reason of their dissolution, but that, within twelve months thereafter, on a proper showing, the court might allow the suit to be maintained by or against their parent and successor corporation, Reconstruction Finance Corporation.

An action instituted by Defense Supplies Corporation was fully tried and argued prior to July 1, 1945. A judgment on the merits was rendered in favor of Defense Supplies Corporation during the subsequent twelve month period and, on appeal, was affirmed on the merits thereafter. The question presented is whether in these circumstances the joint resolution required the judgment to be vacated and the action to be dismissed as abated where no substitution was made and the court was not advised of the statutory dissolution by any of the parties until more than thirty-one months after the event.

STATUTORY PROVISIONS INVOLVED

The Joint Resolution of June 30, 1945, c. 215, 59 Stat. 310, reads as follows:

> That, notwithstanding any other provision of law, all functions, powers, duties, and authority of the corporations hereinafter designated, are hereby transferred, together with all their documents, books of accounts, records, assets, and liabilities of every kind and nature, to Reconstruction Finance Corporation and shall be performed, exercised, and administered by that Corporation in the same manner and to the same extent and effect as if originally vested in Reconstruction Finance Corporation, and the designated corporations are hereby dissolved: Defense Plant Corporation, Metals Reserve Company, Rubber Re-

serve Company, and Defense Supplies Corporation, created by Reconstruction Finance Corporation pursuant to the Act of June 25, 1940 (54 Stat. 572), and Disaster Loan Corporation, created by the Act of February 11, 1937 (50 Stat. 19), are hereby designated as the corporations to which this joint resolution applies.

SEC. 2. The Reconstruction Finance Corporation shall assume and be subject to all liabilities, whether arising out of contract or otherwise, of the corporations dissolved by this joint resolution. No suit, action, or other proceeding lawfully commenced by or against any of such corporations shall abate by reason of the enactment of this joint resolution, but the court, on motion or supplemental petition filed at any time within twelve months after the date of such enactment, showing a necessity for the survival of such suit, action, or other proceeding to obtain a determination of the questions involved, may allow the same to be maintained by or against the Reconstruction Finance Corporation.

SEC. 3. This joint resolution shall take effect on July 1, 1945.

STATEMENT

On February 16, 1944, Defense Supplies Corporation (DSC) brought suit for damages for the destruction of certain quantities of tires and tubes which had been delivered for storage to respondents, Lawrence Warehouse Company and Capitol

Chevrolet Company (R. 3–10). The case came on for trial by the court sitting without a jury on February 13, 1945 (R. 60). Two days were consumed in hearing plaintiff's witnesses (R. 60–62, 98–351) and at the close of their testimony the complaint was dismissed without objection with respect to Constantine Parella and Charles Elmore, whom the complaint named as defendants in addition to respondents (R. 61–62, 307). After moving to dismiss the action at the close of plaintiff's proof (R. 62–63, 308), respondents agreed not to offer any evidence but to let the decision of the court be based upon plaintiff's evidence and respondents' motion (R. 310). Thereupon, on February 15, 1945, the case was argued before the district court (R. 310). After hearing argument the court on February 15, 1945, ordered that the motions to dismiss and the cause be submitted for consideration and decision on memoranda to be subsequently filed, and that the case be continued to May 1, 1945, for submission (R. 63).

On January 9, 1946, the district court filed its opinion (R. 63–75), and ordered the entry of judgment in favor of DSC for damages in the amount of $41,975.15, against the Lawrence Company, the Capitol Company, and McGrew, but exonerating respondent Henry from any liability (R. 76). Findings of fact and conclusions of law were entered on April 15, 1946, to the effect that the quantities of tires and tubes delivered by DSC

to the Lawrence Company and the Capitol Company for storage had been destroyed by fire because of the concurrent negligence of those two companies and respondent McGrew (R. 77–82). Judgment in favor of DSC for damages and costs for slightly in excess of $42,000 and against DSC with respect to Henry was entered the same day (R. 83–84). Notices of appeal were filed in June 1946 by the Lawrence Company and DSC (R. 90, 92), and in July by Capitol Company and McGrew (R. 94, 96). On December 5, 1947, after argument, the court below affirmed the judgment of the district court in its entirety (R. 370–380), and on January 2, 1948, denied petitions for rehearing filed by the Lawrence Company and the Capitol Company (R. 381).

The cause had proceeded to this point solely on the merits of the controversy and no reference had been made in the proceedings by any of the parties to the Joint Resolution of June 30, 1945 (*supra*, p. 3). On February 17, 1948, for the first time, the Lawrence Company and the Capitol Company called attention to the Joint Resolution by filing a motion which requested the Court of Appeals to vacate its judgment of affirmance and to direct the district court to dismiss the action because of the dissolution of DSC and the failure of RFC to be substituted before July 1, 1946 (R. 386–389). Thereupon, on March 2, 1948, petitioners moved that the findings and the judg-

ment be amended to correct the "defect of form" by substituting RFC as plaintiff in place of DSC (R. 392–393). On April 6, 1948, the Court of Appeals denied petitioners' motion for the substitution of RFC and granted respondents' motion to vacate its previous judgment of affirmance and to remand the case to the district court with instructions to dismiss the action (R. 426–427) holding that the action abated because the court lost jurisdiction to consider it upon the failure of the parties to effect the substitution of RFC within a year of July 1, 1945 (R. 396–416). Judge Healy dissented (R. 417–425) on the ground that the court "reached an unconscionable result on the basis of insubstantial and purely technical considerations" which was "arrived at by treating as an insuperable jurisdictional obstacle what ought, at most, be regarded as a procedural omission of no substantial prejudice to any party" (R. 417).

SPECIFICATIONS OF ERRORS TO BE URGED

The United States Court of Appeals for the Ninth Circuit erred:

1. In holding that DSC, after its dissolution, on July 1, 1945, had neither the power to continue and prosecute suits theretofore instituted by or against it and then pending, nor such capacity as would permit courts to enter judgments in its favor in such actions.

2. In holding that upon that dissolution of DSC, all such pending suits abated and could be revived only if, within twelve months thereafter, RFC was substituted in place of DSC.

3. In holding that in the absence of a substitution of RFC, any courts in which such suits are pending lose all jurisdiction to determine them.

4. In holding that the failure to effect a substitution is a defect in jurisdiction and not in form.

5. In holding that the decisions of this Court in *LeCrone* v. *McAdoo*, 253 U. S. 217; *Payne* v. *Industrial Board*, 258 U. S. 613; and *United States ex rel. Claussen* v. *Curran*, 276 U. S. 590, control the construction of the Joint Resolution of June 30, 1945.

6. In granting the motion of the Lawrence Company and the Capitol Company filed with the court on February 17, 1948.

7. In vacating and setting aside its prior judgment of December 5, 1947, and the district court judgment of April 15, 1948.

8. In remanding the case to the district court with instructions to enter an order dismissing the action.

9. In failing to hold that DSC, even after its dissolution, on July 1, 1945, continued in existence at least for twelve months thereafter for the purpose of continuing pending actions and with such capacity as would permit courts to enter judgments in its favor in such actions.

10. In failing to hold that the real party plaintiff in interest in this case was and is the United States.

11. In failing to grant petitioners' motion for an amendment of the pleadings and the judgments to substitute RFC for DSC as the party plaintiff.

SUMMARY OF ARGUMENT

The court below erroneously held that the Joint Resolution of June 30, 1945, required a judgment in the amount of $42,000, affirmed on appeal, rendered in favor of Defense Supplies Corporation for the negligent destruction of Government property to be vacated because Reconstruction Finance Corporation had not been substituted for DSC within twelve months after the effective date of the joint resolution. The joint resolution provided for the transfer of all functions, assets and liabilities of named Government corporations, including DSC, to RFC, and for the dissolution of the named corporations. It further provided that no action by or against any of the dissolved corporations should abate by reason of the enactment of the joint resolution but that, upon a proper showing, the court might allow the action to be maintained by or against RFC. The trial of the action had been completed before the enactment of the joint resolution. The judgment of the district court was rendered before the expiration of the twelve month period. Thereafter an appeal had been taken and the judgment was

affirmed on the merits. The suggestion of a defect in parties was not made until two years after the judgment of the district court and thirty-one months after the enactment of the joint resolution.

It is the Government's position that it was not the purpose of the joint resolution to require substitution of RFC within twelve months as a condition to further proceedings and to the continued validity of a judgment in favor of one of the dissolved corporations. The legislative history of the enactment discloses that the original draft of the joint resolution prepared by RFC contained a single section which provided simply for the transfer of all functions, assets and liabilities of the dissolved corporations to RFC with the same effect "as if originally vested in Reconstruction Finance Corporation." Nothing more was thought necessary to change the form in which the Government would thereafter carry on its functions. The language in section 2 upon which the court below placed main reliance to reach its conclusion was inserted, as the result of a suggestion by Senator Taft, to make certain that none of the rights of creditors of the dissolved corporations would be impaired by the legislative action. There is not a shred of evidence of any intention to make the assertion and perfection of rights conditional upon compliance with additional procedures.

As a further matter, the language actually inserted, considered apart from the legislative

background, does not support the conclusion of the court below. Section 2 contains an "imperative command" that no action "commenced by or against any of such corporations shall abate by reason of the enactment of this joint resolution." Comparable language has been construed by this Court to continue the life of a dissolved corporation for the purpose of pending litigation. *Oklahoma Natural Gas Co.* v. *Oklahoma*, 273 U. S. 257. Moreover, the very Congress which enacted the dissolving statute recognized the continued existence of the "dissolved" corporations in a measure adopted some months later. For these reasons and others, the permissive language in section 2, which authorizes the substitution of RFC in the discretion of the court upon a showing of specified circumstances, should not be construed to make substitution mandatory in all cases as a condition to the continuation of litigation.

Even if the permissive language be construed as requiring substitution in all cases, the judgment rendered in the instant case should not have been vacated. The judgment was rendered by the district court when DSC was still in existence and remained valid even on the assumption that its powers expired for all purposes at the close of twelve months after the effective date of the joint resolution. The decisions of this Court establish that the subsequent termination of corporate powers does not vitiate a judgment valid when ren-

dered. See, particularly, *Walling* v. *Reuter Co.*, 321 U. S. 671. Moreover, the plaintiff in the action was in reality the United States so that the style in which the suit was brought was merely a formal matter. The failure to substitute one Government corporation for another, when both were acting as agencies of the United States, was therefore at most a formal defect. The order of the court below to vacate the district court's judgment because of a defect in form is contrary to statutory direction and the decisions of this Court.

ARGUMENT

The question for decision is whether, under the circumstances presented, the Joint Resolution of June 30, 1945 (*supra*, pp. 3–4), required the vacation of a judgment rendered in favor of Defense Supplies Corporation because of the failure to substitute Reconstruction Finance Corporation, its parent and successor, as party plaintiff. Section 1 of the joint resolution provided for the transfer to RFC of all the powers and duties, together with all the assets and liabilities, of designated wholly-owned government corporations including DSC. It further provided for their administration by RFC "in the same manner and to the same extent and effect as if originally vested in Reconstruction Finance Corporation" and for the dissolution of the named corporations. Section 2 of the joint resolution reiterated the assumption by RFC of "all liabilities" of the dis-

solved corporations, provided that no action commenced by or against any of the corporations "shall abate by reason of the enactment of this joint resolution," and authorized the court to permit any action commenced by or against a dissolved corporation, upon the filing of a motion within twelve months after the date of enactment "showing a necessity for the survival * * * to obtain a determination of the questions involved," to be maintained by or against the RFC. Section 3, the final section of the joint resolution, designated July 1, 1945, as its effective date.

The present action was commenced in February 1944 and the trial was concluded in February 1945. The decision of the district court directing the entry of judgment in favor of DSC was filed in January 1946. Findings and a formal judgment were entered in April 1946. Thus the trial of the action was concluded several months before the joint resolution was enacted and all proceedings in the district court relating to the awarding of judgment were completed before the expiration of twelve months after its enactment. No attempt to effect the substitution of RFC was made until some two years later, after the district court judgment had been affirmed on appeal on the merits, when respondents suggested the abatement of the action because RFC had not been substituted. The majority of the court below held that the failure to substitute RFC within

twelve months of the effective date of the joint resolution rendered void the judgment entered before the expiration of this period and directed the district court to dismiss the action.

The decision of the court below deprives the United States of a judgment of some $42,000 awarded for the negligent destruction by respondents of government property. The judgment was awarded after a complete trial on the merits which was subsequently affirmed on appeal. The suggestion of a defect in the proceedings was first made four years after the suit had been instituted, three years after the conclusion of the trial in the district court, and more than two months after affirmance on the merits of the district court's judgment by the Court of Appeals. Respondents' motion to vacate the judgment of affirmance and direct dismissal of the action as abated was made more than thirty-one months after RFC succeeded by statute to the functions, assets, and liabilities of DSC.

It is the Government's position that private interests should not stand to be thus enriched at the expense of the public treasury. Respondents had their day in court and lost on the merits of the cause. They prosecuted an appeal on the merits which also went against them. It was error, in these circumstances, we contend, to set aside this meritorious judgment affirmed on appeal on the extremely technical ground that the

name in which the Government originally asserted its cause of action was required to be changed by a subsequent statutory enactment. It is inconceivable that when Congress enacted the Joint Resolution of June 30, 1945, it contemplated the possibility of its interpretation to permit or require the forfeiture of a money judgment obtained on behalf of the United States. If the language and background of the statute clearly pointed in this direction, we would suppose that it would be followed most reluctantly. The legislative history of the enactment, however, contains nothing to suggest this intention and comparable statutory language has been construed by this Court to negate abatement. Moreover, the application of any one of several principles adopted by this Court and other courts in analogous situations requires reinstatement of the judgment in favor of the Government.

I

THE JOINT RESOLUTION DID NOT REQUIRE SUBSTITUTION IN INSTANT CASE

The decision of the court below rests principally on the language in Section 2 of the joint resolution to the effect that "the court, on motion or supplemental petition filed at any time within twelve months after the date of such enactment, showing a necessity for the survival of such suit, action, or other proceeding to obtain a determina-

tion of the questions involved, may allow the same to be maintained by or against the Reconstruction Finance Corporation." It was the conclusion of a majority that this provision made substitution a jurisdictional prerequisite to further proceedings and that failure to substitute within twelve months was a fatal and irremedial defect. We submit that neither the language itself, considered in its context, nor the circumstances responsible for its presence in the joint resolution justify these conclusions.

A. THE STATUTORY BACKGROUND

The joint resolution in question was proposed by the RFC to permit the consolidation into RFC of various subsidiary corporations created to perform specific functions in the national emergency.[1] Hearings before Senate Committee on Banking and Currency on S. J. Res. 65, 79th Cong., 1st sess., p. 2. The purposes for which the corporations were established had been substantially accomplished and "some administrative reorganization at this time is desirable. The transfer to the Reconstruction Finance Corporation of the

[1] Pursuant to the terms of 15 U. S. C. 606 b (3) DSC was charted by RFC, at the request of the Federal Loan Administrator with the approval of the President, as a wholly owned subsidiary of RFC on August 29, 1940. 13 C. F. R. (1941 Supp.) 1566–1568. The charter recited "that the corporation shall be an instrumentality of the United States" and "that this Charter and the By-Laws may be amended at any time by Reconstruction Finance Corporation." *Id.* at 1568.

functions, powers, duties, and authority of these corporations would simplify operations and it may reasonably be expected that some economy in operation can be effected." *Ibid.*

As originally proposed the joint resolution consisted in its entirety of what is now Section 1 and contained no reference whatever to survival of actions or substitution. *Id.* at p. 1. The original language was intended, and was apparently considered sufficient, to make RFC responsible for all liabilities and contracts of the dissolved corporations. *Id.* at pp. 10–11. Since no specific mention was made of liabilities being asserted in court proceedings, the language of Section 1 providing for administration by RFC "in the same manner and to the same extent and effect as if originally vested in Reconstruction Finance Corporation" presumably was considered adequately broad to cover the situation. This clearly suggests a contemplated continuity of all the functions of DSC in RFC with the change in name a legal formality. See pp. 37–42, *infra*. The formal nature of the transfer is evidenced by the further facts that "management would remain where it is now, in the Board of Directors of the Reconstruction Finance Corporation, the members of which at the present time are also the directors of the corporations" and that "no transfer of personnel would be required, since all the corporations affected by the resolution are now staffed with R. F. C. employees." *Id.*, at pp. 2–3.

Section 2, which gives rise to the present controversy, is present in the resolution only because of a suggestion by Senator Taft that it might more effectively carry out the original intent of RFC. It is clear that there was no purpose to create procedural obstacles or impose conditions to the maintenance of actions already commenced but rather to facilitate the assertion of rights. In fact, there is reason to believe that Section 2 was designed solely to aid creditors of DSC in enforcing their rights and was never intended to affect the rights of the Government.

The hearings before the Senate Committee reflect the reason for the additional language in the joint resolution. "In regard to the legal implications of this bill," Senator Taft raised the question "whether there should be a specific statement that R. F. C. shall become responsible for the liabilities and contracts of these corporations," and "whether it might not be desirable, in order that contractors might not be in doubt, to have the express statement that all liabilities and contracts of these corporations shall be passed on to R. F. C. and that R. F. C. shall become responsible for them." *Id.*, at pp. 10–11. John W. Snyder, Federal Loan Administrator at the time,[2] who testified for the RFC, explained that "that was the intention."

[2] 1939 Reorganization Plan No. 1, § 402, 4 F. R. 2727, 53 Stat. 1429, provided that the administration of RFC should be supervised by the Federal Loan Administrator.

Id., at p. 11. Senator Taft then suggested a clarifying amendment to be drafted by the RFC general counsel. *Ibid.* There was no further discussion of the matter and the joint resolution was unanimously reported six days later with the present Section 2 as an amendment. 91 Cong. Rec. 4782, 5628; S. Rep. No. 285, 79th Cong., 1st sess. The measure was passed by the Senate shortly thereafter without discussion. 91 Cong. Rec. 5628.

The House adopted the bill as approved by the Senate without change and without any discussion relating to the amendment or its possible effect. 91 Cong. Rec. 6959; H. Rep. No. 815, 79th Cong., 1st sess.; Hearings before House Committee on Banking and Currency on S. J. Res. 65, 79th Cong., 1st sess. The only relevant discussion, a colloquy between Representative Spence, chairman of the committee, and Representative Martin of Massachusetts, confirms the intention of Congress to accomplish nothing more than a simplification of the governmental machinery for carrying on certain functions by dissolving a number of corporations and providing a mechanism for continuing their functions. The discussion follows (91 Cong. Rec. 6958):

> Mr. MARTIN of Massachusetts. It merely provides for the dissolution of a number of agencies?

Mr. SPENCE. That is correct.

Mr. MARTIN of Massachusetts. It provides for nothing else?

Mr. SPENCE. It provides for nothing else.

* * * * *

Mr. SPENCE. * * * It merely transfers certain rights, duties, authority, and assets of these corporations to the Reconstruction Finance Corporation for the orderly dissolution of the corporations and the continuation of such functions as are required to be continued.

The legislative background thus discloses that Section 2 of the joint resolution was not intended to have any independent effect but was merely incorporated out of an abundance of caution to assure creditors and contractors of DSC the preservation of their rights against RFC. Further corroboration of this conclusion may be found in the wording of the opening sentence of Section 2 which provides that "the Reconstruction Finance Corporation shall assume and be subject to all liabilities, whether arising out of contract or otherwise, of the corporations dissolved by this joint resolution." It will be noted that no mention is here made of obligations owing to the dissolved corporations although the transfer of both assets and liabilities of the dissolved corporations were treated together in the original proposal which remains as the first section of the joint resolution as amended. It is thus apparent that

the amendment was calculated to meet the limited suggestion of Senator Taft. We submit that the court below misconceived the purpose of Section 2 when it interpreted the provision, incorporated out of an abundance of caution to protect the rights of creditors, as requiring that a judgment in favor of the Government, awarded and affirmed on the merits, be vacated because of a failure to invoke the discretionary substitution provision within the twelve-month period.

B. THE STATUTORY LANGUAGE

The statutory language, even considered apart from its Congressional history, does not support the result reached by the court below. As already pointed out, the first sentence in Section 2 relates exclusively to liabilities of the dissolved corporations and thus manifests the preoccupation of the section with actions against rather than actions by the dissolved corporations. The remaining language of the section furnishes additional support for the Government's position that it was entitled to have its judgment remain intact. The provision that "No suit, action, or other proceeding lawfully commenced by or against any of such corporations shall abate by reason of the enactment of this joint resolution * * *" is similar to statutory language which this Court has construed to continue the life of a dissolved corporation for the purpose of pending litigation. *Oklahoma Natural Gas Co.* v. *Oklahoma*, 273

U. S. 257. The Oklahoma statute there involved provided that "no action whereto any such [dissolved] corporation is a party shall abate by reason of such dissolution." Although the corporation in question had been legally dissolved, the Court stated that "The language of the section would seem to indicate that as there is to be no abatement the Oklahoma Natural Gas Company for litigating purposes is still in being and continues to be a party before this Court" (p. 260). Thus it would seem that the provision against abatement in the joint resolution should be similarly construed to continue the life of DSC for litigation purposes without requiring that anything further be done. "It is not necessary to revive a suit upon dissolution of a corporate party, nor to substitute the corporation's trustees as parties, where under the law the suit is not abated." 16 Fletcher, Cyclopedia of Corporations, § 8151.

The sole prerequisite to the continued existence for litigating purposes of a dissolved corporation is the intent of the creating sovereign. *National Bank v. Colby*, 21 Wall. 609, 615; *Title Co. v. Wilcox Bldg. Corp.*, 302 U. S. 120, 125. The practice of continuing the life of dissolved corporations to permit the completion of litigation is a common one. The Joint Resolution of June 30, 1945, in providing against abatement of pending actions, is similar in purport to a large

body of similar state statutes which "are designed to continue the life of the corporation for a definite or indefinite period after its dissolution, and either expressly or impliedly authorize suits and actions by and against it in its corporate name, during the time its existence is thus perpetuated." 16 Fletcher, Cyclopedia of Corporations, § 8143; see Note, 47 A. L. R. 1397, *et seq.* The intention of Congress to keep alive, for at least some purposes, the corporations dissolved by the joint resolution on July 1, 1945, is made clear beyond question not only by the express provision against abatement in the dissolving resolution but also by its own recognition five months later that DSC was still in existence. In providing for the financial control of "wholly owned Government Corporations" in the Act of December 6, 1945 (c. 557, 59 Stat. 597), Congress defined that term as including, among other named agencies, "Defense Supplies Corporation" and the other corporations dissolved by the joint resolution enacted in June of the same year. Since DSC obviously, therefore, continued in existence at least for the continuation of this and other pending litigation, the direction of the court below that the judgment rendered in its favor be vacated because of abatement was clearly erroneous.

The opinion of the court below is based largely upon the language in Section 2 of the joint resolution, immediately following the directive against

abatement, which provides as follows: "but the court, on motion or supplemental petition filed at any time within twelve months after the date of such enactment, showing a necessity for the survival of such suit, action, or other proceeding to obtain a determination of the questions involved, may allow the same to be maintained by or against the Reconstruction Finance Corporation." This provision, together with the language in Section 1 to the effect that all functions of DSC shall be performed by RFC, was thought to make mandatory the substitution of RFC as a condition to continuation of the action and to deprive the court of jurisdiction of the action altogether if substitution was not effected within twelve months. We believe that Section 1 was intended to accomplish the general transfer of functions, without more, and that the quoted language from Section 2 did not compel abatement upon failure to substitute.

There is nothing in the Section 2 language relied upon of a mandatory character. It merely confers discretion upon the courts, on a proper showing, to permit substitution. The translation of this permissive authorization into an inflexible requirement upon penalty of abatement must be predicated upon what is supposed to be the necessary implication of the language rather than upon the express language itself. But it is impossible to reconcile this implication with the contradic-

tory and unqualified express statement that "no suit, action, or other proceeding * * * shall abate." Whatever scope the permissive substitution language may have, it would seem ineffective to erase the unequivocal mandate against abatement. Moreover, in view of the clear evidence that the whole of Section 2 was incorporated in the legislation out of an abundance of caution to preserve liabilities against the dissolved corporations and that it was not a carefully drafted provision with other specific ends, it need not be read with the meticulous concern for harmonizing all its terms which is normally accorded legislative action.

The view that the non-abatement provision is not vitiated by the permissive substitution language was adopted by the Court of Appeals in *Gaynor* v. *Metals Reserve Co.*, 166 F. 2d 1011. In that case, suit was brought against Metals Reserve Company, another of RFC's subsidiary corporations whose existence was terminated by the Joint Resolution of June 30, 1945, to recover damages for the alleged breach of certain sales contracts. Process was served on Metals Reserve Company on March 30, 1945, and an answer filed by it on April 4, 1945. The case was then continued to the June 1947 Term, and on Metals Reserve Company's motion at that time, the district court dismissed the action as abated, no substitution of RFC having been effected

within the twelve-month period provided by the joint resolution. On appeal, however, the Eighth Circuit Court of Appeals held that abatement was precluded by the very language of the resolution but that the provisions with respect to the substitution of RFC established a condition precedent to plaintiff's right to protect his action against that successor corporation, but not to his right to pursue the case against the dissolved subsidiary corporation. Considering it significant that the resolution contains the imperative command that by the dissolution of the corporation no suit 'shall abate,' while the provision with reference to substituting the Reconstruction Finance Corporation * * * is clearly permissive, as indicated by the use of the word 'may'" (166 F. 2d at 1014), the court said:

> * * * the Metals Reserve Company, for the purpose of litigating plaintiff's claim, is still in being. That plaintiff failed to take proceedings for the substitution of the Reconstruction Finance Corporation can in no manner affect the liability of defendant Metals Reserve Company. It can have no concern with the question as to whether plaintiff has preserved his right to seek relief against the Reconstruction Finance Corporation. Certainly, the failure to make such a motion was no ground for dismissing the action as against the defendant Metals Reserve Company * * * (166 F. 2d at 1015).

The Court of Appeals for the Eighth Circuit thus found a meaning for the clause permitting substitution without impairing "the imperative command" against abatement.

Although the Eighth Circuit Court of Appeals found scope for the operation of the substitution language, we believe its background as an amendment to the original RFC draft of the joint resolution would seem to make unnecessary exploration of the circumstances to which it might apply. Whatever its scope, the requirement of a showing of necessity for survival would seem to render it of no possible application to a suit by one of the dissolved corporations to recover money damages for the negligent destruction of government property. As pointed out in the dissent below (R. 420–421), the provision—

> can not rationally be applied to a case like this and was not intended to be. The questions involved in the suit were the familiar ones arising in all cases of like character. They were whether negligence on the part of the defendants had caused or contributed to the property loss sustained by the government, and if so, the amount in money of the recoverable loss. This being an ordinary tort action where the plaintiff's right to damages had vested, the continuing necessity for the determination of the questions at issue would seem to be apparent on the face of the pleading. And, if this were not so, the necessity for their determination

> had already been amply demonstrated in the course of the trial. No additional showing of necessity was possible, and no reason existed for attempting to make one unless, indeed, it were permissible to think that the government no longer needed to be compensated for its loss.

Although denying its applicability to the instant case, the dissenting opinion pointed out that the clause "doubtless has its uses." It observed that the provision "appears to have been lifted from the existing statute having to do with a survival of suits against public officers in relation to the discharge of their official duties." It then went on to suggest that in enacting the provision Congress "would seem to have had in mind the possible existence of special circumstances where a change in conditions, such as the lapse of emergency legislation or the like, might have made decisions of the points at issue of no more than academic interest or rendered futile or inappropriate the grant of the relief sought." (R. 421.)

The suggestion that the substitution provision might impose a requirement in some circumstances and not in others finds support in the decisions. In *Fleming* v. *Goodwin*, 165 F. 2d 334 (C. A. 8), certiorari denied, 334 U. S. 828, the court in dealing with a question of substitution under Rule 25 (d) of the Federal Rules of Civil Procedure, held that substitution was required in accordance with terms of the rule only when reliance upon

the rule was necessary to revive an action which otherwise would have abated. It held that compliance with the rule was unnecessary in cases involving public officials which did not abate upon their retirement from office and that the action before the court, one brought by the Price Administrator to recover treble the amount of alleged overcharges in the sale of wrist watches, was such an action. This result was reached although this Court in another type of case involving the Price Administrator had held the rule applicable. *Fleming* v. *Mohawk Wrecking & Lumber Co.*, 331 U. S. 111.

The reasoning of the Court of Appeals would seem equally applicable in the instant case where, for reasons already indicated and others yet to be shown (*infra*, pp. 39–44), it is clear the Government's action would not have abated even without statutory authority to substitute. The conclusion of that court with respect to the purpose of the rule would also apply with equal force in the instant case (165 F. 2d at 337–338):

> We are convinced that Rule 25 (d) of the Federal Rules of Civil Procedure was not promulgated for the purpose of hampering the Government in its efforts, through its proper officers, to enforce its laws or to obtain judgment for money rightfully due it or for statutory damages. The Rule was never intended to relieve defendants, in actions brought on behalf of the Government, of their statutory liability to the Government.

Other decisions have similarly held that the effect of a failure to comply with the rule or statute relating to the substitution of public officials depended upon the nature of the action and whether or not it would have abated without the express authorization to substitute. See *Porter* v. *Maule*, 160 F. 2d 4 (C. A. 5); *Thomas B. Bishop Co.* v. *Santa Barbara County*, 96 F. 2d 198 (C. A. 9); *Porter* v. *Pure Oil Co.*, 7 F. R. D. 577 (E. D. Pa.); cf. *United States* v. *Koike*, 164 F. 2d 155 (C. A. 9).

Review of the legislative history of the enactment and an analysis of its terms in the light of existing authorities demonstrate that the court below completely misconceived the effect of the statutory language. The original drafters of the joint resolution contemplated a simple provision to effect a transfer of functions without affecting any substantive rights. Out of an abundance of caution amendments were made to assure that this result would be accomplished. These amendments contain an "imperative command" that actions shall not abate and a further provision authorizing substitution, which the decisions indicate is applicable only in cases in which specific statutory authority to substitute is necessary to maintain the action. Since the present action would not have abated in the absence of authority to substitute, the failure to comply with the conditions for substitution was of no effect and there

was no occasion to vacate the judgment on the merits obtained by DSC.

The decisions of this Court upon which the court below relies—*LeCrone* v. *McAdoo*, 253 U. S. 217; *Payne* v. *Industrial Board of Illinois*, 258 U. S. 613; and *United States ex rel. Claussen* v. *Curran*, 276 U. S. 590—do not support its ruling. The *Curran* case, which the majority of the Court of Appeals cited as particularly conclusive of the instant case, was concerned with the Act of February 13, 1925 (c. 229, 43 Stat. 936, 941), which provided, in pertinent part, that pending cases against an officer of the United States who died or resigned might be permitted to be continued against his successor in office "if within six months after his death or separation * * * it be satisfactorily shown to the court that there is a substantial need * * *" for doing so. The 1925 statute, however, lacked the clear declaration, present in the Joint Resolution of June 30, 1945, that pending litigation should not abate. And the survival of pending litigation was there specifically made conditional on timely substitution, whereas, in the 1945 resolution, no language appears importing such a condition to survival. In *LeCrone* v. *McAdoo*, 253 U. S. 217, and *Payne* v. *Industrial Board of Illinois*, 258 U. S. 613, which dealt with the 1899 predecessor to the 1925 Act (Act of February 8, 1899, c. 121, 30 Stat. 822), a statute much more like the 1945

resolution in language, though the writs of error were dismissed, the judgments below were not disturbed; thus, the failure to effect an appropriate substitution was deemed only to have deprived this Court of authority to review the decisions of the lower courts, but not to have required the abrogation of those judgments and the dismissal of the actions, as in the Claussen case, where the 1925 statute was controlling.

The *Claussen, LeCrone,* and *Payne* cases are not in point for the further reason that the 1889 and 1925 Acts, with which they were concerned, were radically different in genesis and design from the June 30, 1945 resolution. Those two Acts were general statutes intended to afford relief from the common-law rule that *personal* actions by or against public officers abated upon their death or separation from office. See *United States ex rel. Bernardin* v. *Butterworth,* 169 U. S. 600; *Irwin* v. *Wright,* 258 U. S. 219. The *Claussen, LeCrone,* and *Payne* cases were all such personal suits. An action at common law involving a continuing duty of the public office, rather than the personal performance of the individual officer, did not, however, abate upon his separation from office. *Thompson* v. *United States,* 103 U. S. 480; *Marshall* v. *Dye,* 231 U. S. 250; *Bowden* v. *Johnson,* 107 U. S. 251, 264; *Murphy* v. *Utter,* 186 U. S. 95; *People ex rel. Chicotte* v. *Best,* 187 N. Y. 1; *Weadon* v. *Shahen,* 50 Cal. App. 2d 254;

cf. *Fix* v. *Philadelphia Barge Co.*, 290 U. S. 530, 533. Thus, such actions presented no problem of abatement, no relief was needed in such cases, the 1899 and 1925 statutes were not intended to apply to them, and certainly they were not meant to abate them. Cf., *e. g.*, *Murphy* v. *Utter*, 186 U. S. 95 with *Ex parte La Prade*, 289 U. S. 444, 456–457. The instant suit clearly is one of this latter type of action; it was instituted in a representative capacity; it is in no sense a personal suit. See *United States* v. *Summerlin*, 310 U. S. 414, 416; *Federal Housing Administration* v. *Burr*, 309 U. S. 242, 249–250. The construction which the courts have afforded to the 1899 and 1925 Acts is, therefore, wholly irrelevant to the case in hand, particularly in light of the express provision in the Joint Resolution of June 30, 1945, against abatement. Cf. *Fleming* v. *Goodwin*, 165 F. 2d 334, 337–338 (C. A. 8), certiorari denied, 334 U. S. 828.

II

APPLICATION OF SUBSTITUTION CLAUSE IN INSTANT CASE DID NOT REQUIRE JUDGMENT TO BE VACATED

Even if it be assumed that the provision permitting substitution of RFC, upon a proper showing, within twelve months, was applicable to the present action and was intended to terminate the authority of the dissolved corporations to continue litigation if not complied with, the judgment awarded DSC should not have been

vacated. The judgment was rendered by the district court when DSC was still alive and should be upheld as valid notwithstanding the subsequent expiration of powers. Furthermore, the United States at all times was the real plaintiff in the action. The corporations through which the United States acted were merely agencies of the Government. The substitution of parties was therefore a formal matter of the most technical character and the failure to comply with the substitution provisions was a defect of form which should not have stood in the way of an adjudication on the merits.

A. TERMINATION OF ALL POWERS OF DSC DID NOT RENDER PRIOR JUDGMENT VOID

It has been shown that the case had been fully tried and argued before the enactment of the joint resolution providing for the dissolution of DSC. Moreover, the judgment in favor of DSC was awarded long before the twelve month period for substitution had expired. In view of the explicit mandate against abatement, it seems clear that the corporation survived for litigation purposes at least for the twelve months in which substitution was authorized. As previously pointed out, Congress named DSC as an existing Government Corporation several months after the enactment of the joint resolution which purported to dissolve it. This judgment was rendered by the district court when there can be no question that DSC

was still alive and, therefore, no question of its validity at the time of entry. We believe the decisions of this Court establish that a judgment valid when rendered is not rendered void by the subsequent dissolution of the corporation. In the comparable situation of the death of a party to an action, it has been held that a court had the power to *enter* judgment in favor of the plaintiff after the plaintiff died where the case had been tried and submitted before his death. *Mitchell* v. *Overman*, 103 U. S. 62. And in the recent case of *Walling* v. *Reuter Co.*, 321 U. S. 671, it was held that the dissolution of a corporation pending review by this Court on certiorari would not be permitted to interfere with the judgment rendered by the district court.

In the *Reuter* case the effect of dissolution under Louisiana law was to destroy all capacity to be sued. The Court pointed out that where for any reason it lacks power to proceed with an appeal, "it may nevertheless, in the exercise of its supervisory appellate power, make such disposition of the case as justice requires." It stated that "the judgment of the District Court was entered against respondent before it was dissolved and while it was capable of being sued" and that "it was binding on respondent" and others who might be brought within its reach. The Court concluded that "it does not follow, because the pending appellate proceeding has abated,

that the judgment of the District Court has abated because of respondent's dissolution. Nor does it follow, because of this Court's inability to proceed with the appeal on the merits for want of a proper party respondent, that petitioner is to be deprived of the benefit of his judgment in the District Court, which the statute contemplates shall be undisturbed save only by pursuit to completion of the prescribed appellate procedure." 321 U. S. at 676.

In the *Reuter* situation, the effect of the holding is that the district court judgment had sufficient vitality to be reinstated after having been reversed by the court of appeals. Frustration of full review by dissolution, the Court said, "cannot rightly be made the implement for depriving petitioner of the benefit of his judgment in the District Court." The Court concluded "that in the circumstances the only just and appropriate disposition which can be made of this case is that the judgment of the Court of Appeals be vacated, and the judgment of the District Court restored, as though respondent had taken no appeal." 321 U. S. at 677–678. We submit that if it was proper to reinstate a district court judgment that was *reversed* on appeal, after dissolution of a corporation without surviving powers, there was no requirement in the instant case, as the court below seems to have believed, that the judgment *affirmed* on appeal be vacated. See, also, *Pendle-*

ton v. *Russell*, 144 U. S. 640, 646; *Coughlin* v. *District of Columbia*, 106 U. S. 7; Note, 62 A. L. R. 1048.

The error of the holding that the termination of DSC's powers required the judgment rendered during its existence to be vacated is further demonstrated by the various decisions which avoid the effect of death or dissolution of parties by the entry of judgments *nunc pro tunc* as of a date prior to the death or dissolution. *Mitchell* v. *Overman*, 103 U. S. 62; *Louisville & N. R. Co.* v. *Behlmer*, 175 U. S. 648; *City of New Orleans* v. *Warner*, 176 U. S. 92; *Bell* v. *Bell*, 181 U. S. 175; *Shakman* v. *United States Credit System Co.*, 92 Wisc. 366; *Florida Development Co.* v. *Polk County National Bank*, 76 Fla. 629; Notes, 3 A. L. R. 1403, 68 A. L. R. 265. This device has been employed where the death occurred at different stages of the proceeding. In *Mitchell* v. *Overman*, 103 U. S. 62, for example, a *nunc pro tunc* judgment was upheld although the plaintiff died before the actual decision in the trial court but after trial and submission of the case, and in *Bell* v. *Bell*, 181 U. S. 175, judgment was entered *nunc pro tunc* by this Court where the plaintiff in error died after argument but before decision.

Evidence that no jurisdictional barrier is presented by the failure to make timely substitution or by the dissolution of a corporate party is also furnished by the decisions which indicate that the

plea in abatement may be waived if not promptly presented. See *United States* v. *Smith*, 289 U. S. 422, 426; *Trounstine* v. *Bauer, Pogue & Co.*, 144 F. 2d 379 (C. A. 2), certiorari denied 323 U. S. 777; *Matthison* v. *Payne*, 98 N. J. L. 383, affirmed, 99 N. J. L. 285. The lapse of thirty-one months in the instant case between the time substitution was possible and the time the question of substitution was first raised by respondents would seem to make this a proper case for application of the waiver principle. But whether or not the circumstances are deemed to constitute a waiver, it is clear that the subsequent dissolution of DSC did not render the prior judgment invalid.

B. THE FACT THAT THE UNITED STATES WAS THE REAL PLAINTIFF IN THE ACTION RENDERS THE FAILURE TO SUBSTITUTE AN INCONSEQUENTIAL DEFECT IN FORM

The fact that the United States has chosen the corporate form to carry out its government functions has been held by this Court on numerous occasions not to alter the essential fact that the corporation is still acting for and on behalf of the United States. Accordingly, in many instances government corporations have been treated as the United States. The right to plead a counterclaim granted to "the Government of the United States," for example, has been held applicable to a claim of RFC. *Cherry Cotton Mills* v. *United States*, 327 U. S. 536. The power of a national bank to pledge assets to secure the deposit of pub-

lic money has been held to extend to wholly owned government corporations. *Inland Waterways Corp.* v. *United States*, 309 U. S. 517. See also, *Clallam County* v. *United States*, 263 U. S. 341; *Emergency Fleet Corporation* v. *Western Union Telegraph Co.*, 275 U. S. 415; *Federal Crop Ins. Co.* v. *Merrill*, 332 U. S. 380, 384.

There can be little question that in this case the United States was the real party plaintiff. As alleged in the complaint (R. 4) and found by the district court (R. 78), the entire capital stock of DSC was owned by the United States, and the corporation was no more than "an agency, arm and instrumentality of the United States" engaged solely in carrying out governmental purposes. As stated by its charter, DSC was an instrumentality of the United States Government created "in order to aid the Government of the United States in its national-defense program." *Southern Pacific Co.* v. *RFC*, 161 F. 2d 56, 58 (C. A. 9). Thus, the corporate cloak cannot disguise the plain fact that in this case the United States was the true party in interest acting purely for governmental purposes and on behalf of the United States. See also notes 1 and 2, *supra*.

Property of DSC has been held to be property of the United States. *Southern Pac. Co.* v. *Reconstruction Finance Corp.*, *supra*. An action brought by DSC has been held to be "nothing more than an action by the United States." *De-*

fense Supplies Corp. v. *United States Lines Co.*, 148 F. 2d 311, 312 (C. A. 2), certiorari denied, 326 U. S. 746. Many cases have held that the United States may be the plaintiff in actions based upon contracts of government corporations. *Russell Wheel & Foundry Co.* v. *United States*, 31 F. 2d 826 (C. A. 6); *United States* v. *Skinner & Eddy Corporation*, 35 F. 2d 889 (C. A. 9), petition for certiorari dismissed, 281 U. S. 770; *United States* v. *Czarnikow-Rionda Co.*, 40 F. 2d 214 (C. A. 2), certiorari denied, 282 U. S. 844; *Reconstruction Finance Corporation* v. *Krauss*, 12 F. Supp. 44 (D. N. J.); *Reconstruction Finance Corporation* v. *Graydon*, 16 F. Supp. 765 (E. D. S. C.); *United States* v. *Freeman*, 21 F. Supp. 593 (D. Mass.); *United States* v. *Arthur*, 23 F. Supp. 537 (S. D. N. Y.).

Since the action here instituted by DSC was actually one on behalf of the United States, it survived the dissolution of DSC, and a formal substitution of the United States, the real party in interest, or its new agent, RFC, in place of DSC, would have constituted "nothing more than a formal amendment to the title of the action to conform it to the truth." *Fleming* v. *Goodwin*, 165 F. 2d 334, 338 (C. A. 8), certiorari denied, 334 U. S. 828. See, also, *Porter* v. *Maule*, 160 F. 2d 1 (C. A. 5); *United States* v. *Koike*, 164 F. 2d 155 (C. A. 9); *Porter* v. *Pure Oil Co.*, 7 F. R. D. 577 (E. D. Pa.); cf. *American Transp. Co.* v.

Swift & Co., 24 F. 2d 310 (C. A. 2); *Atkins* v. *W. A. Harriman & Co., Inc.*, 69 F. 2d 66 (C. A. 2); *Reardon* v. *Balaklala Consol. Copper Co.*, 193 Fed. 189 (N. D. Cal.); *Ingraham* v. *Terry*, 11 Humph. (Tenn.) 572. Consequently, this suit should either have been deemed continued by the United States in the name of the original nominal plaintiff without substitution (cf. *Porter* v. *Pure Oil Co.*, 7 F. R. D. 577 (E. D. Pa.)); the United States should have been substituted as plaintiff (cf. *United States* v. *Koike*, 164 F. 2d 155 (C. A. 9)); or the successor agent, RFC, should have been substituted (cf. *United States* v. *Saunders Petroleum Co., Inc.*, 7 F. R. D. 608 (W. D. Mo.)).[3]

As a defect in form consisting of the failure to substitute one nominal plaintiff for another, the omission would not justify the abatement of the action. To permit abatement in these circumstances would be contrary to the express direction of R. S. 954 (28 U. S. C. (1946 ed.) 777) that "No * * * judgment * * * in any court of the United States, shall be abated, arrested, quashed, or reversed for any defect or

[3] See also Rule 25 (c) which provides that in case of any transfer of interest the action may be continued by or against the original party. Compare 28 U. S. C. 2404 to the effect that no civil action for damages brought by or on behalf of the United States or in which it is interested shall abate on the death of a defendant.

want of form."[4] Cf. *Bowden* v. *Johnson*, 107 U. S. 251. Although R. S. 954 was repealed effective September 1, 1948, by Section 39 of the Act of June 25, 1948 (Pub. Law 773, 80th Cong., 2d sess.), it does not appear that its repeal affects the instant case since that section also provides that "Any rights or liabilities now existing under such [repealed] sections or parts thereof shall not be affected by this repeal." Thus, R. S. 954 would still seem to be applicable to the judgment in this case which was entered on April 6, 1948 (R. 426–427). Moreover, it is stated expressly in the legislative history of the repealing act that the reason for repealing R. S. 954 was that the subject matter thereof was "Covered by Rules 1, 15, and 61 of the Federal Rules of Civil Procedure" (see H. Rep. 308, 80th Cong.,

[4] The entire section reads as follows:

SEC. 954. No summons, writ, declaration, return, process, judgment, or other proceedings in civil causes, in any court of the United States, shall be abated, arrested, quashed, or reversed for any defect or want of form; but such court shall proceed and give judgment according as the right of the cause and matter in law shall appear to it, without regarding any such defect or want of form, except those which, in cases of demurrer, the party demurring specially sets down, together with his demurrer, as the cause thereof; and such court shall amend every such defect and want of form, other than those which the party demurring so expresses; and may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as it shall, in its discretion and by its rules, prescribe.

1st sess., p. A239).[5] Under "the mandate of that statute" it was the duty of the court below "to disregard niceties of form and to give judgment as the right of the cause shall appear to it." *Hoiness* v. *United States*, 335 U. S. 297, 300–301. The affirmance of the district court's judgment in favor of DSC by the court below before its attention was called to the omission to substitute clearly indicates its views as to "the right of the cause" in the absence of deficiencies of form.

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[5] Rule 61 provides as follows:

Rule 61. HARMLESS ERROR. No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court below be reversed and that the judgment of the district court be reinstated.

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